75

(2)

No. 07-86

IN THE
Supreme Court of the United States

JAMES V. CROSBY, JR.,
Petitioner,

v.

WILLIE MATHEWS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

ADINA H. ROSENBAUM
Counsel of Record
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

GUY BENNETT RUBIN
RUBIN & RUBIN
520 South Federal
Highway
P.O. Box 395
Stuart, Florida 34995
(772) 283-2004

Counsel for Respondent

November 2007

QUESTION PRESENTED

Whether the Eleventh Circuit erred in holding that a prison warden was not entitled to qualified immunity for abuse of an inmate by correctional officers under his supervision, where the warden assigned correctional officers about whose abuse of prisoners he had been warned to areas with direct contact with high-risk inmates; delegated abuse-of-force complaints to his secretary; and discontinued a procedure used by his predecessor to reduce problems during uses of force.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF THE CASE 1

A. Factual Background 1

B. Proceedings Below 4

REASONS FOR DENYING THE WRIT 6

A. The Eleventh Circuit Correctly Stated the Applicable Law Regarding Qualified Immunity. 6

B. The Eleventh Circuit Properly Applied This Court's Qualified Immunity Test. 7

C. The Decision Below Is Correct. 10

CONCLUSION 13

TABLE OF AUTHORITIES

CASES

Anderson v. Creighton,
483 U.S. 635 (1987) 7, 9

Estate of Davis by Ostenfeld v. Delo,
115 F.3d 1338 (8th Cir. 1997) 11

Farmer v. Brennan,
511 U.S. 825 (1994) 11

Fundiller v. City of Cooper City,
777 F.2d 1436 (11th Cir. 1985) 10

Hale v. Tallapoosa County,
50 F.3d 1579 (11th Cir. 1995) 11

Hope v. Pelzer,
536 U.S. 730 (2002) 8

LaMarca v. Turner,
995 F.2d 1526 (11th Cir. 1993) 11-12

McGee v. Barrett,
2007 WL 1799650
(N.D. Ga. June 19, 2007) 9-10

Muhammad v. Washington Mutual F.A.,
2007 WL 1020840
(N.D. Ga. Mar. 28, 2007) 10

Rivas v. Freeman,
940 F.2d 1491 (11th Cir. 1991) 10-11

Saucier v. Katz,
533 U.S. 194 (2001) 5, 7, 8

Skrtich v. Thornton,
280 F.3d 1295 (11th Cir. 2002) 2

United States v. Lanier,
520 U.S. 259 (1997) 9

Ware v. Jackson County, Missouri,
150 F.3d 873 (8th Cir. 1998) 12

STATUTE AND RULE

42 U.S.C. § 1983 4

S. Ct. R. 10 7

INTRODUCTION

Petitioner Crosby's sole argument for review is that the Eleventh Circuit erred in its application of the second step of the *Saucier v. Katz* test for qualified immunity. Although the Eleventh Circuit's discussion of the second step of the *Saucier* inquiry was brief, it set forth the clearly established law on supervisory liability that, in 1999, gave Crosby fair warning that his actions (or lack thereof) violated constitutional rights. Crosby's actions were not objectively legally reasonable, and the court of appeals' decision was correct.

STATEMENT OF THE CASE

A. Factual Background

Petitioner James V. Crosby used to be the warden at Florida State Prison (FSP). When Crosby first arrived at FSP, the previous warden, Ron McAndrew, warned Crosby about guards who McAndrew believed abused inmates and needed to be kept out of high-risk areas, such as X-Wing, which housed inmates with serious disciplinary problems, because McAndrew "was afraid they would kill an inmate." App. 9. McAndrew offered to sit down with Crosby for a "desk audit" to discuss problems at FSP, because, according to McAndrew, FSP "had a notorious reputation for the beating of inmates." Crosby refused the audit. *Id.* at 11. Instead, McAndrew left Crosby a written list of guards he believed were abusive. *Id.* at 9.

Timothy Thornton was one of the guards about whom McAndrew specifically warned Crosby. *Id.* Not long before Crosby became warden, Thornton had been involved in an incident in which an inmate on X-Wing was beaten so severely that he had to be airlifted to a

hospital, where he stayed for nine days, suffering from chest trauma, including multiple broken ribs and hemopneumothorax; back, shoulder, and knee injuries; scalp laceration; abdominal trauma; and post-trauma anemia. *See Skrtich v. Thornton*, 280 F.3d 1295, 1300 (11th Cir. 2002). McAndrew had moved Thornton away from X-Wing and other areas where Thornton might have the opportunity to abuse inmates, and specifically warned Crosby that "this guy is dangerous. . . . . You need to get him off the payroll." App. 10. After Crosby became warden, however, Thornton was promoted to Captain, assigned to areas of direct contact with inmates, and personally selected by Crosby to receive free officer housing, bypassing a waiting list of other officers. *Id.*

Crosby also played an instrumental role in bringing Montrez Lucas, an officer with whom he had previously worked, to FSP. Lucas had been disciplined before being moved to FSP, bragged about being suspended—but not fired—for using excessive force, and was later investigated for having taught correctional officer trainees, in June 1999, to engage in practices such as falsifying use-of-force forms, taking "free shots" at inmates who were handcuffed, using chemical agents on inmates after they became compliant, instructing trainees about which parts of the body could be kicked without leaving boot prints, and bringing inmates to the medical ward for minor injuries and then beating them severely after they were returned to their cells. *Id.* at 11.

In contrast to his treatment of Thornton and Lucas, Crosby transferred away from FSP an assistant warden whom McAndrew had hired because he

believed she would actively pursue the goal of reducing inmate abuse. *Id.* at 12.

While Crosby was warden, he received numerous abuse-of-force complaints and inquiries about prison conditions. For example, he was sent multiple letters from inmates stating that corrections officers had threatened to kill them; a letter from an inmate's family alleging the inmate was beaten by a sergeant and taken to the hospital and that they had not had contact with him since; and a letter on behalf of an inmate questioning the need for guards to continue using force on an inmate after he was handcuffed and shackled. *Id.* at 15-16.

Notably, Crosby did not read abuse-of-force complaints or use-of-force forms. Although McAndrew had informed Crosby that he had reason to believe that Crosby's secretary was obstructing inmate abuse investigations, Crosby delegated responsibility for dealing with the complaints to that secretary. *Id.* at 14.

Crosby also discontinued a practice that prior wardens had been using to cut down on problems during uses of force. McAndrew and his predecessor had videotaped "cell extractions," removals of prisoners from their cells when they refused to be restrained by handcuffs and leg irons. Although McAndrew believed videotaping cell extractions encouraged officers to behave more professionally, Crosby stopped the practice. The court of appeals found that "[v]iewing all facts and inferences in the light most favorable to Mathews, it could be inferred that Crosby's action in discontinuing the use of the cameras once he became warden, despite knowledge that specific FSP officers were suspected of unwarranted assaults upon inmates,

sent a message to corrections officers that the administration at FSP was going to permit further abuse of inmates." *Id.* at 12-13.

On July 4, 1999, the Florida Department of Corrections transferred Willie Mathews from Hamilton Correctional Institution to FSP, where he was assigned a cell on X-Wing. Even before being escorted to his cell, Mathews was assaulted by FSP correctional officers. Over the following week, correctional officers repeatedly beat Mathews, resulting in serious injury, including a broken jaw. *Id.* at 4-5. Timothy Thornton oversaw at least one of the beatings. *Id.* at 9.

On July 17, 1999, correctional officers at FSP, once again including Timothy Thornton, beat to death Frank Valdes, another X-Wing inmate. Only after Valdes was killed was Mathews transferred out of FSP and provided surgery for his broken jaw. *Id.* at 8.

B. Proceedings Below

Mathews brought this action under 42 U.S.C. § 1983 for violation of his rights under the Eighth and Fourteenth Amendments. Crosby filed a motion to dismiss based on qualified immunity, which the district court denied. The court of appeals affirmed the denial. Crosby then filed a motion for summary judgment, which the district court granted. *Id.* at 22-36.

The court of appeals reversed. It began by explaining that qualified immunity gives "complete protection to government officials" when they have not violated clearly established rights of which a reasonable person would have known. *Id.* at 4 (quoting *Lee v. Ferraro*, 284 F.3d 1188, 1193-94 (11th Cir. 2002)). It then set forth the Court's two-step test for

determining whether qualified immunity applies: "First, we ask 'do the facts alleged show the government official's conduct violated a constitutional right?'" *Id.* at 5 (quoting *Saucier v. Katz*, 533 U.S. 194 (2001)). "If a constitutional violation is established . . . we then must determine whether such conduct would have violated federal law that was clearly established at the time of the incident." *Id.*

Turning to the first question under the qualified immunity inquiry, the court set forth the standards for supervisory liability under § 1983. *Id.* at 6. The court then detailed the extensive evidence demonstrating that Crosby was on notice of a history of widespread abuse at FSP, that he failed to correct the situation, and that he established customs or policies resulting in deliberate indifference to inmates' constitutional rights. At the end of this factual description, the Court summarized:

> [A] jury could find that Crosby received copies of . . . [complaints] concerning the abuse of inmates by guards at FSP, including allegations of abuse of Mathews. Furthermore, Crosby had been specifically warned by his predecessor about certain guards whose abuse of inmates was so severe that the prior warden felt one of them might kill an inmate if not stopped. Crosby, however, did not take steps to neutralize those guards and on at least one occasion sought to give one of the guards preferential treatment in housing. Mathews also presented evidence that Crosby had a reputation for being a "hands-off" warden; regularly delegated

> responsibility for his office's grievance response management to his secretary; and failed to keep guards with known records of alleged abuse away from assignments near at-risk inmates, such as those on X-wing.

Id. at 16. The court found that these facts, if found by the jury, were sufficient to establish a constitutional violation. *Id.* at 16-17.

Turning to the second step of the qualified immunity inquiry—whether Crosby had violated clearly established law—the court determined that, by 1999, it was clearly established that a warden could face liability for behavior such as Crosby's. *Id.* at 17-18.

Crosby filed a petition for rehearing en banc, which was denied by the Eleventh Circuit, without any judge requesting that the court be polled on whether to rehear the case. *Id.* at 37-38.

REASONS FOR DENYING THE WRIT

A. The Eleventh Circuit Correctly Stated the Applicable Law Regarding Qualified Immunity.

In considering whether Crosby was entitled to qualified immunity, the Eleventh Circuit explained that "qualified immunity offers complete protection for government officials sued in their individual capacities as long as their conduct violates no clearly established statutory or constitutional rights of which a reasonable person should have known." App. 4 (quoting *Lee v. Ferraro*, 248 F.3d at 1193-94). Petitioner does not question that the Eleventh Circuit properly stated this standard, nor that it properly identified the two-step test for determining whether a government official is

entitled to qualified immunity set forth by this Court in *Saucier v. Katz*, 533 U.S. 194.

Similarly, Petitioner does not claim that the decision below conflicts with decisions from other circuits, or with opinions from state courts of last resort, or that it has departed from the accepted course of judicial proceedings. And Petitioner has not suggested any confusion among the lower courts on how to apply the *Saucier* inquiry in supervisory liability cases.

Instead, Petitioner's request for further review is based on the argument that the court of appeals erred in its application of the *Saucier* inquiry. *See* Pet. at ii. The Eleventh Circuit properly applied the qualified immunity test in this case, but, even if it had not, Petitioner's disagreement with the court of appeals' application of the *Saucier* inquiry is not worthy of this Court's review. *See* S. Ct. R. 10.

B. The Eleventh Circuit Properly Applied This Court's Qualified Immunity Test.

Petitioner contends that the Eleventh Circuit erred by applying qualified immunity at too general a level and by failing to employ an objective legal reasonableness standard. *See* Pet. 7-8. In fact, however, the clearly established law set forth by the court of appeals had, as required by this Court, "sufficiently clear [contours]" that, under the circumstances of this case, Crosby reasonably should have known that his conduct violated the law. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

1. Petitioner's argument (at 10-11) that the court of appeals failed to undertake the required "fact-specific inquiry," takes the Eleventh Circuit's discussion of

clearly established law out of context. That discussion followed an extensive account of the particular facts of this case. Although the court did not repeat those facts after setting forth the clearly established law, the court expressly recognized that the qualified immunity test required it to determine whether the government official's conduct violated clearly established law. App. 4. The opinion as a whole makes clear that the court of appeals concluded that Crosby's particular actions, undertaken in the "specific context of the case," *Saucier*, 533 U.S. at 201, violated the clearly established law it laid out.

2. The court of appeals' discussion of clearly established law did not contain just "an assertion that it was clearly established that supervisory liability could be imposed where there is a causal connection between a supervisor's actions and the claimed constitutional violation by subordinates" Pet. 9. Nor did it look at the law of supervisory liability "in the most general possible terms." *Id.* at 10. Rather, the court of appeals recognized that, by 1999, when Mathews was assaulted by the correctional officers, multiple sets of facts could demonstrate the causal connection necessary to establish supervisory liability—including failure to act in the face of a history of widespread abuse and the adoption of customs and policies that result in deliberate indifference to constitutional rights. The court concluded that the facts alleged in this case, if found by a jury, could support liability under one of those clearly established standards. The caselaw set forth by the court of appeals gave Crosby "fair warning" that his acts were unconstitutional. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

To be sure, in determining whether Crosby violated clearly established law, the court below did not cite cases requiring wardens to videotape cell extractions, accept desk audits from their predecessors, or not delegate abuse-of-force complaints to their secretaries. But the requirement that the clearly established law be considered at a level of specificity that a reasonable person would understand that what he is doing violates the law does "not [mean] that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." *Anderson*, 483 U.S. at 640. "[G]eneral statements of the law are not inherently incapable of giving fair and clear warning, and . . . a general constitutional rule already identified in decisional law may apply with obvious clarity to the specific conduct in question . . . ." *United States v. Lanier*, 520 U.S. 259, 271 (1997). Here, based on the clearly established law set forth by the Eleventh Circuit, a reasonable warden in Crosby's position should have known that his actions were illegal.

3. Petitioner contends that the court of appeals' decision"effectively results in improper denial of qualified immunity to *all* supervisory government officials." Pet. 27. But the court's brief discussion of qualified immunity cannot be divorced from its extensive description of the facts, which demonstrate that, given the state of the law in 1999, Crosby acted in a manner that a reasonable warden should have known was not lawful. Since the decision below, courts in the Eleventh Circuit have continued to grant qualified immunity to supervisors where—unlike in this case—clearly established law did *not* provide the supervisor with fair warning that his or her actions violated the Constitution. *See McGee v. Barrett*, 2007

WL 1799650, at *11-12 (N.D. Ga. June 19, 2007) (granting qualified immunity even though there was a genuine issue of material fact as to whether supervisor's actions were a constitutional violation); *Muhammad v. Wash. Mutual F.A.*, 2007 WL 1020840, at *4-5 (N.D. Ga. Mar. 28, 2007) (concluding that no constitutional violation took place, but even if it had, supervisor would be entitled to qualified immunity because he would not have been on notice that his actions violated constitutional rights).

C. The Decision Below Is Correct.

In 1999, when Mathews was assaulted by correctional officers under Crosby's supervision, it was clearly established that a supervisor could be held liable if a history of widespread abuse put the supervisor on notice of the need to take corrective action, and the supervisor failed to do so. *See, e.g.*, *Fundiller v. City of Cooper City*, 777 F.2d 1436 (11th Cir. 1985) (holding that a Public Safety Director could be liable for an undercover police officer's use of unnecessary and unreasonable force, where the city's police officers had engaged in a pattern of excessive force during arrests, and the public safety director, although aware of the excessive force, had failed to take corrective steps). Despite the history of widespread abuse of inmates by FSP correctional officers, however, Crosby did not take corrective action. To the contrary, he promoted and gave preferential treatment to a guard about whom his predecessor had specifically warned him. It was also clearly established in 1999 that a supervisor could be held liable for a custom or practice that could be expected to result in, and in fact resulted in, deliberate indifference to constitutional rights. *See Rivas v. Freeman*, 940 F.2d

1491, 1495 (11th Cir. 1991) (holding sheriff liable on grounds that his failure to establish policies and procedures caused the plaintiff's arrest and unnecessary incarceration). Nonetheless, Crosby engaged in practices—such as discontinuing the practice of videotaping cell extractions and delegating responsibility for abuse-of-force complaints to his secretary—that resulted in such deliberate indifference.

Moreover, it was clearly established in 1999 that a prison official could be liable under § 1983 if he was deliberately indifferent to a substantial risk of serious harm, in that he knew about the risk of harm but failed to act, *Farmer v. Brennan*, 511 U.S. 825, 842 (1994), including if he failed to reassign officers or other inmates known or alleged to be violent. *See Estate of Davis by Ostenfeld v. Delo*, 115 F.3d 1388, 1396 (8th Cir. 1997) (prison superintendent deliberately indifferent and liable for correctional officer's excessive use of force where superintendent had received complaints that officer used excessive force on other inmates and had been informed by district assistant for the fourth senatorial district of Missouri that corrections officer should be discharged or reassigned due to complaints that he had used excessive force against inmates); *Hale v. Tallapoosa County*, 50 F.3d 1579, 1583-84 (11th Cir. 1995) (sheriff could be found deliberately indifferent where he knew of history of inmate-on-inmate violence and did not pursue measures such as adequately supervising and monitoring inmates, adequately training jailers, and assigning inmates to bunks based on likelihood of violence); *LaMarca v. Turner*, 995 F.2d 1526, 1535-38 (11th Cir. 1993) (prison superintendent deliberately indifferent to prisoner safety where he knew of

unreasonable risk of violence but disregarded multiple means of addressing the risk, including failing "to transfer known assailants or inmates who should have been known assailants out of [the prison]"); *cf. Ware v. Jackson County, Missouri*, 150 F.3d 873, 885 (8th Cir. 1998) (finding causal connection between county's deliberate indifference to allegations of sexual misconduct and inmate's rape where prison director did not reassign correctional officer to floor that did not house female inmates or take other precautionary measures). Here, a jury could easily conclude that Crosby knew of the substantial risk of harm to inmates from the conduct of correctional officers, but he disregarded means of addressing that risk, including reassigning guards about whom he had been warned to areas where they would not have contact with at-risk prisoners.

Petitioner emphasizes that qualified immunity should be given to supervisory government officials "when they reasonably believe their actions are not unlawful,'" Pet. 13, but this case is not about "mistaken judgments." *Id.* (quoting *Hunter v. Bryant*, 502 U.S. 224, 229 (1991)). This case is about a warden who, despite having been explicitly warned about a guard, proceeded to promote that guard, give him preferential treatment, and allow him direct contact with at-risk prisoners; who did not bother to handle abuse-of-force complaints and use-of-force forms himself, but instead delegated them to his secretary, who his predecessor had believed was obstructing inmate abuse investigations; who discontinued videotaping cell extractions, a method former wardens had used to cut back on use-of-force problems; who the prison chaplain testified had a "hands-off" approach, thereby allowing the "good old boys" network of guards to mistreat

inmates, App. 13; who "sent a message to corrections officers that the administration at FSP was going to permit further abuse of inmates." *Id.* at 12-13. Crosby's actions were not objectively reasonable, and the court of appeals was correct in denying him qualified immunity.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Adina H. Rosenbaum
Counsel of Record
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

Guy Bennett Rubin
RUBIN & RUBIN
520 South Federal Highway
P.O. Box 395
Stuart, Florida 34995
(772) 283-2004

November 2007 Counsel for Respondent